No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS; SCOTT WILFORD; JELENA FIGUEROA; GEORGE W. WHITE, JR., KEVIN ROUGHTON; PEGGY SEARCY; JOSE MANSO; HARLAN ELRICH; KAREN CUEN; IRENE ZAVALA; and CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL.
Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

California law requires every teacher working in most of its public schools to financially contribute to the local teachers' union and that union's state and national affiliates in order to subsidize expenses the union claims are germane to collective-bargaining. California law also requires public-school teachers to subsidize expenditures unrelated to collective-bargaining unless a teacher affirmatively objects and then renews his or her opposition in writing every year. The questions presented are:

1. Whether *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

2. Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants in the court below, are: Rebecca Friedrichs, Scott Wilford, Jelena Figueroa, George W. White, Jr., Kevin Roughton, Peggy Searcy, Jose Manso, Harlan Elrich, Karen Cuen, and Irene Zavala; and the Christian Educators Association International ("CEAI"). CEAI is a nonprofit religious organization that is the only professional association specifically serving Christians working in public schools. Founded and incorporated in the state of California, CEAI's membership consists of teachers, administrators, and para-professionals, and many other public- and private-school employees. CEAI has approximately 600 members in the State of California. CEAI is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with more than a 10% ownership stake in CEAI.

Respondents, who were Defendants-Appellees in the court below, are the California Teachers Association; National Education Association; Savanna District Teachers Association, CTA/NEA; Saddleback Valley Educators Association; Orange Unified Education Association, Inc.; Kern High School Teachers Association; National Education Association-Jurupa; Santa Ana Educators Association, Inc.; Teachers Association of Norwalk-La Mirada Area; Sanger Unified Teachers Association; Associated Chino Teachers; San Luis Obispo County Education Association; Sue Johnson (as superintendent of Savanna School District); Clint Harwick (as superintendent of the Saddleback Valley

Unified School District); Michael L. Christensen (as superintendent of the Orange Unified School District); Donald E. Carter (as superintendent of the Kern High School District); Elliott Duchon (as superintendent of the Jurupa Unified School District); Thelma Meléndez de Santa Ana (as superintendent of the Santa Ana Unified School District); Ruth Pérez (as superintendent of the Norwalk-La Mirada Unified School District); Marcus P. Johnson (as superintendent of the Sanger Unified School District); Wayne Joseph (as superintendent of the Chino Valley Unified School District); and Julian D. Crocker (as superintendent of the San Luis Obispo County Office of Education).

In addition to these parties, California Attorney General Kamala D. Harris intervened in the district court proceeding, was a Defendant-Intervenor in the court of appeals, and is thus a party to the proceeding.

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OPINIONS BELOW

The Ninth Circuit's order affirming the district court is reproduced in the Joint Appendix (JA18), as is the district court's order dismissing Petitioners' claims on the pleadings (JA19-24).

JURISDICTION

The Ninth Circuit entered judgment on November 18, 2014. JA18. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the Joint Appendix (JA25-68).

STATEMENT

Respondents administer the largest regime of compelled political speech in the Nation. The State of California requires its public-school teachers to make hundreds of millions of dollars in annual payments to Respondent California Teachers Association ("CTA"), Respondent National Education Association ("NEA"), and their local affiliates. These annual payments are substantial, yielding $173.98 million in dues for CTA alone in 2013. Cal. Teachers Ass'n, 2012–2013 *Financial Statements* at 4, http://goo.gl/a3k1Nf. California law makes these payments mandatory for every teacher working in an agency-shop school—which is virtually every teacher.

This multi-hundred-million-dollar regime of compelled political speech is irreconcilable with this Court's decisions in every related First Amendment context, as well as its recent recognition of "the critical First Amendment rights at stake" in such arrangements. *Knox v. Serv. Emps. Int'l Union*, 132

S. Ct. 2277, 2289 (2012). The logic and reasoning of this Court's decisions have shattered the legal foundation of its approval of such compulsion in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—a decision that was questionable from the start, as Justice Powell argued persuasively in his separate opinion. *Id.* at 245 (Powell, J., concurring in the judgment) (describing the majority's opinion as "unsupported by either precedent or reason"). The Court should now discard that jurisprudential outlier.

Regardless of whether the Court overrules *Abood*, it should require that public employees affirmatively consent before their money is used to fund concededly political speech by public-sector unions. This Court's longstanding refusal to "presume acquiescence in the loss of fundamental rights," *Knox*, 132 S. Ct. at 2290 (citation omitted), requires affirmative consent. The Court strongly suggested as much in *Knox* and should now confirm it.

A. California's Agency-Shop Laws For Public-School Teachers

1. The "Agency Shop" Arrangement

The State of California empowers school districts to require public-school teachers, as a condition of employment, to either join the union in their district or pay the financial equivalent of dues to that union. This requirement, known as an "agency shop" arrangement, operates as follows.

California law allows a union to become the exclusive bargaining representative for "public school employees" in a bargaining unit (usually a school

district) by submitting proof that a majority of employees in the unit wish to be represented by the union. CAL. GOV'T CODE § 3544(a). A "public school employee" is "a person employed by a public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees [who facilitate employee relations on behalf of management]." *Id.* § 3540.1(j). Once a union becomes the exclusive representative, it represents all "public school employees" in that district in bargaining with the district. *Id.* § 3543.1(a). Unions can bargain over wide-ranging "[t]erms and conditions of employment" that go to the heart of education policy, including "wages," "hours," "health and welfare benefits," "leave," "transfer and reassignment policies," "class size," and procedures for evaluating employees and processing grievances. *Id.* § 3543.2(a).

Once a union becomes the exclusive bargaining representative, California law requires compelled subsidization of that union. Specifically, the Education Code mandates that school districts "shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the" union. *Id.* § 3546(a). The amount of this "fair share service fee"—known as an "agency fee"—is determined by the union and "shall not exceed the dues that are payable by [union] members." *Id.*

In practice, agency fees typically equal the amount of union dues. Pet.App.79a. Under *Abood*, however, the union must divide this fee into chargeable and nonchargeable portions. The

chargeable amount purports to support union activities that are "germane to [the union's] functions as the exclusive bargaining representative." CAL. GOV'T CODE § 3546(a). California law frames this category of expenses to include "the cost of lobbying activities designed to foster collective bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the employer." *Id.* § 3546(b).

Even under *Abood*, the First Amendment forbids compelling nonmembers to support union activities that are "not devoted to ... negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative." *Id.* § 3546(a); *Abood*, 431 U.S. at 235-36. The union is responsible for annually determining which expenses fall into this "nonchargeable" category. Unions make this determination by calculating the total agency fee based on expenditures for the coming year, then calculating the nonchargeable portion of this fee based on a recent year's expenditures. REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32992(b)(1).[1]

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[1] There is one narrow exception to paying agency fees. California provides that employees with a religious objection to supporting unionism—a category that includes Petitioner Irene Zavala, JA77-79 (¶ 20)—"shall not be required to ... financially support any employee organization as a condition of employment"; but such employees must, "in lieu of a service fee, [] pay sums equal to such service fee" to a charitable group on "a list of at least three such funds, designated in the organizational security arrangement." CAL. GOV'T CODE (continued)

2. The Collective-Bargaining Process In California

California law recognizes that public-sector bargaining resolves important political issues. "All initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records." CAL. GOV'T CODE § 3547(a). California law further specifies that "[m]eeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal at a meeting of the public school employer." *Id.* § 3547(b). The express "intent" of these requirements is to ensure that the public is "informed of the issues that are being negotiated upon and have [a] full opportunity to express their views on the issues to the public school employer, and to know of the positions of their elected representatives." *Id.* § 3547(e).

3. The *Hudson* Notice And Objection Process

Each fall, the union must send a "*Hudson* notice" to all nonmembers stating the amount of the agency

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§ 3546.3. Teachers invoking this exemption thus have to give their money to a union-approved charity, while also paying the full agency fee—not just the chargeable portion. *See, e.g.*, JA173-75.

fee and providing a breakdown of its chargeable and nonchargeable portions. *Id.* § 3546(a); REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32992(a); *see generally Chi. Teachers Union v. Hudson*, 475 U.S. 292, 304-07 (1986). That notice must include either the union's audited financial report for the year or a certification from its independent auditor confirming that the chargeable and nonchargeable expenses have been accurately stated. REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32992(b)(1). The independent auditor does not, however, confirm that the union has properly classified its expenditures. *See Knox*, 132 S. Ct. at 2294; JA423-25; JA565-69.

To avoid paying for nonchargeable expenditures, a nonmember is required to "opt out" each year by notifying the union of his or her objection. REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32993. The period to lodge this objection must last at least thirty days, and typically lasts no more than six weeks. *Id.* § 32993(b). Teachers who opt out are entitled to a rebate or fee-reduction for that year. CAL. GOV'T CODE § 3546(a).

B. Respondent Unions' Implementation Of These Procedures

1. Respondent Unions Collect Agency Fees At The National, State, And Local Level.

For each school district where Petitioners work, the local union determines the total agency fee, often in collaboration with CTA. JA88 (¶ 58); JA636-37 (¶ 58). After the union informs the district of the year's agency-fee amount, the district automatically deducts that amount in pro rata shares from the

teacher's paychecks. The district sends the deducted amounts directly to the local union or CTA.

The local union's agency fee includes "affiliate fees" for CTA and NEA. Those "affiliate fees" are treated as partially "chargeable," with the chargeable-nonchargeable allocation based on statewide expenditures by CTA and NEA. The portions of CTA and NEA "affiliate fees" deemed "chargeable" therefore do not correspond to actual collective-bargaining expenditures CTA and NEA make within each teacher's district. JA89 (¶ 60); JA637 (¶ 60).

Agency fees for nonmembers typically consume roughly two percent of a new teacher's salary. These fees sometimes increase even absent an increase in teacher pay. The total amount of annual dues is often approximately $1,000 per teacher, while the amount of the refund received by nonmembers who opt out is generally around $350 to $400 annually. JA90 (¶ 63); JA638 (¶ 63).

2. Teachers Who Object To Subsidizing "Nonchargeable" Expenses Must Renew Their Objections Every Year.

Respondents require nonmembers to "opt out" of subsidizing nonchargeable expenses every year, in writing, during a roughly six-week period following the annual *Hudson* notice. JA89-90 (¶ 62); JA637-38 (¶ 62). No matter how many consecutive years a nonmember opts out, that person still must send an annual letter to CTA each year. If a teacher misses the deadline, he or she is obligated to pay the full agency fee. *See, e.g.*, Pet.App.79a; Pet.App.96a-97a; JA660-61 (¶ 111).

C. Proceedings Below

On April 30, 2013, Petitioners filed a complaint challenging Respondents' agency-shop regimes and opt-out requirements.[2] On September 19, 2013, California Attorney General Kamala Harris intervened in the district court. Petitioners acknowledged in their complaint and explained to the district court that, while this Court's decision in *Knox* had called *Abood* into question, the district court did not have the authority to revisit *Abood* on its own. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Petitioners likewise acknowledged that the Ninth Circuit's decision in *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258 (9th Cir. 1992), precluded the district court from granting relief on their second claim concerning "opt-out." Petitioners therefore sought a quick ruling that would enable them to promptly take their claims to a forum with the power to vindicate them and, in turn, abate their irreparable First Amendment harms. The district court agreed on both counts, entering judgment on the pleadings against Petitioners on December 5, 2013.

Petitioners appealed the district court's judgment to the Ninth Circuit, where they again conceded that *Abood* and *Mitchell* foreclosed their

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[2] Petitioner George White retired from teaching in June 2015—shortly before this Court granted certiorari—and so his individual claims are now moot. But this obviously remains a live dispute, because the other nine individual Petitioners remain California public-school teachers who object to compelled subsidization of Respondent Unions, and CEAI has members who are similarly situated. *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 446-47 (2009).

claims. Petitioners again requested a quick ruling without delaying for oral argument on issues the three-judge panel lacked the authority to revisit. Respondents opposed that course, asking the Ninth Circuit to conduct oral argument and issue a published opinion "address[ing] the merits of [the] issue[s] despite acknowledging that the outcome was dictated by controlling precedent." Union Opp. to Mot. for Summ. Affirm. at 5, ECF No. 50, *Friedrichs v. Cal. Teachers Ass'n*, No. 13-57095 (9th Cir. Oct. 14, 2014). The Ninth Circuit declined Respondents' request to issue an advisory opinion and instead summarily affirmed the district court on November 18, 2014. JA18.

Petitioners filed their petition for a writ of certiorari in this Court on January 26, 2015. Both Respondent Unions and the California Attorney General filed Briefs in Opposition, while none of the school superintendants who actually employ Petitioners took a position. This Court granted the petition on June 30, 2015.

SUMMARY OF ARGUMENT

Every year, California law requires thousands of public-school teachers to pay hundreds of millions of dollars to the NEA, the CTA, and their local affiliates. This annual tribute subsidizes those unions for the quintessentially political act of extracting policy commitments from local elected officials on some of the most contested issues in education and fiscal policy. That regime presents the basic question whether the First Amendment permits states to compel their public-school teachers

to fund specific, controversial viewpoints on fundamental matters of educational and fiscal policy.

In this era of broken municipal budgets and a national crisis in public education, it is difficult to imagine more politically charged issues than how much money local governments should devote to public employees, or what policies public schools should adopt to best educate children. Yet California and more than twenty other states compel millions of public employees to pay hundreds of millions of dollars to fund a very specific viewpoint on these pressing public questions, regardless of whether those employees support or benefit from the union's policies.

While this Court previously permitted public-sector agency shops in *Abood*, 431 U.S. 209, it has recognized twice in the past four Terms that *Abood* misinterpreted the vital First Amendment rights at stake in such arrangements. This Court has consistently held that both the freedom to speak (or not speak) and the freedom to associate (or not associate) trigger exacting review, even in the context of mundane commercial speech or garden-variety civic groups. That is true regardless of whether the government is regulating the citizenry at large or requiring its employees to support and affiliate with particular political entities. And the most stringent review plainly applies to public-sector collective-bargaining, given that public-sector bargaining involves speech about controversial issues of fiscal and education policy—a "truism" *Abood* itself recognized. 431 U.S. at 231. In short, it is clear that exacting scrutiny applies where, as here, a state compels its public-school teachers to subsidize

a particular viewpoint on political issues and forces them to associate with public-sector unions.

It is also clear that this compelled-subsidization regime cannot satisfy exacting scrutiny (or, indeed, any level of First Amendment review). Bedrock First Amendment principles forbid the compelled support of ideological advocacy. *Abood* and its current supporters all acknowledge that this is the general rule; they contend only that the normal proscription against compelled subsidization of ideological advocacy should not apply in the collective-bargaining context. *Abood* held this general prohibition does not apply to collective-bargaining, even though public-sector bargaining entails political speech, simply because the Court's prior decisions tolerated such subsidization in the private sector. *Abood*'s current supporters, in contrast, justify *Abood*'s rule by repudiating its reasoning. While conceding that the First Amendment forbids compelled subsidization of political speech on matters of public concern, they argue that public-sector bargaining does not involve such speech.

In *Harris*, however, this Court rejected—without dissent—*Abood*'s conclusion that decisions approving compelled subsidization of bargaining speech in the *private* sector somehow authorized compelled subsidization of bargaining speech in the *public* sector. *See Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014) ("The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union."). This Court's recent decisions also hold that collective-bargaining speech—which concerns allocating scarce public funds and how to

retain, assign. and supervise teachers—is ideological speech about controversial public issues, just like union lobbying on those same topics. Since all agree that governments have no interest sufficient to compel subsidization of ideological activities by unions (such as lobbying), and since there is no principled distinction between lobbying advocacy and collective-bargaining advocacy, the government has no interest that is sufficient to justify mandatory subsidization of collective-bargaining.

In any event, the proffered interests supporting compelled subsidization of collective-bargaining cannot withstand scrutiny.

First, this compelled subsidization cannot be justified by the government's interest in "labor peace"—*i.e.*, preventing "[t]he confusion and conflict that could arise if rival teachers' unions, holding quite different views ... sought to obtain the employer's agreement," *Abood*, 431 U.S. at 224. An employer's interest in negotiating with a single union is an argument for having just one union. It does not support the different proposition that the employer can force unwilling employees to financially support that union. This interest is only even *implicated* upon a showing that agency fees are essential to the union's very survival. Respondents have not and cannot allege as much, since public-sector unions are flourishing in the federal government and the many states that prohibit agency fees.

Second, the government has an interest in preventing "free-riding" only if it threatens labor peace by imperiling the union's existence. The government has no legitimate, independent interest

in enhancing the union's coffers at dissenting employees' expense. Since, again, the absence of agency fees will not bankrupt unions, preventing "free-riding" cannot justify compelled subsidization of collective-bargaining any more than it justifies compelled subsidization of other union advocacy, or any other advocacy group. And besides, teachers who reject their union's policies obviously are not "free riding" on the policies they reject.

Against all this, it has been suggested that unions are uniquely privileged to demand compensation from so-called "free riders" because unions have a statutory duty to nondiscriminatorily include nonmembers in the policies they collectively bargain for. But that "duty" is simply a necessary, minor limit on the exclusive-representation power that unions voluntarily assume. Exclusive representatives possess state-bestowed authority to speak for and bind all employees on the most important topics in those employees' professional lives. That extraordinary fiduciary *power*—which unions eagerly seize—is tolerable only if accompanied by a fiduciary *duty* to not discriminate against the conscripted nonmembers.

The "free rider" justification is thus *weaker* in the collective-bargaining context than anywhere else. Exclusive representation cuts off employees' ability to engage in bargaining speech and compels them to "free ride" on the union's (conflicting) speech. Dissenting employees thus suffer a state-imposed burden that is not imposed on those who "free ride" on non-exclusive advocacy groups. Requiring such employees to "compensate" unions for the "free ride" is less justified than in all other contexts, where

dissenters are free to engage in their own advocacy and thus voluntarily "free ride."

Nor does *Pickering v. Board of Education*, 391 U.S. 563 (1968), save *Abood*. *Pickering*'s test governs workplace discipline for employee speech—not compelled support for ideological advocates. But "even if the permissibility of the agency-shop provision in the collective-bargaining agreement now at issue were analyzed under *Pickering*, that provision could not be upheld." *Harris*, 134 S. Ct. at 2643. Not even the *Harris* dissenters suggested that agency fees are tolerable under *Pickering* if they subsidize speech about matters of public concern, as they plainly do.

Given *Abood*'s outlier status, it is unsurprising that this Court's decisions on stare decisis uniformly favor overruling it. Dispositively, the Court has never invoked stare decisis to sustain a decision that wrongly *eliminated* a fundamental right. To the contrary, this Court has "not hesitated to overrule decisions offensive to the First Amendment." *Citizens United v. F.E.C.*, 558 U.S. 310, 363 (2010).

In any event, the standard principles of stare decisis support overturning *Abood*. First, *Abood* is an "anomaly" that conflicts with general First Amendment jurisprudence. The Court confirmed as much in *Harris* when no Justice defended *Abood* on its stated rationale. The dissenters in that case purported to square *Abood* with this Court's other decisions only by both rejecting its conclusion that collective-bargaining entails political speech and by replacing its rule with the *Pickering* test. Overturning the *Abood* outlier thus serves the prudential goals of consistency and predictability in

this Court's decisions. Second, *Abood* has not created any valid reliance interests. Invalidating agency fees would not disturb existing collective-bargaining agreements. And if "a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any [] 'entitlement' to its persistence." *Arizona v. Gant*, 556 U.S. 332, 349 (2009). Third, post-*Abood* legal developments have strengthened the First Amendment rights of public employees. Fourth, *Abood* has proved unworkable, as reflected in this Court's repeated, divisive efforts to apply—or even articulate—a principled line for identifying (or effectively challenging) which expenditures are "chargeable."

Finally, on the second Question Presented, basic First Amendment principles that this Court reaffirmed in *Knox* and *Harris* require states to minimize the burden they impose on teachers' established right to not subsidize concededly political activities. Respondents' requirement that Petitioners affirmatively and annually object to subsidizing those activities violates that rule. If it did not, California could direct 1% of every employee's wages to the Democratic Party, so long as employees could "opt out" of the deduction. Requiring employees to affirmatively prevent concededly political wage-garnishment serves no legitimate public purpose, impermissibly influences the right to voluntarily make such contributions, and wrongly "presumes acquiescence in the loss of fundamental rights." *Knox*, 132 S. Ct. at 2290.

ARGUMENT

I. *Abood* Should Be Overruled.

A. Government Coercion Of Individuals To Support Political Speech Must Satisfy Exacting Scrutiny.

1. As Thomas Jefferson famously stated, "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" I. Brant, JAMES MADISON: THE NATIONALIST 354 (1948). This Court has long recognized that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see also e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association [] plainly presupposes a freedom not to associate."). It is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 134 S. Ct. at 2644.

The Court has thus consistently applied exacting scrutiny to compelled subsidization, invoking both the "speech" and "association" protections of the First Amendment. Even for "mundane commercial ... speech," it is "clear that compulsory subsidies ... are subject to exacting First Amendment scrutiny." *Knox*, 132 S. Ct. at 2289. In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), a congressionally-established "Mushroom Council" was authorized to

fund its advertising programs promoting mushrooms by imposing mandatory assessments on handlers of fresh mushrooms. United Foods objected to that regime because it wanted "to convey the message that its brand of mushrooms is superior to those grown by other producers." *Id.* at 411. This Court invalidated the mandatory assessments, explaining that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *Id.*

Similarly, "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed" regardless of whether the association is political. *Knox*, 132 S. Ct. at 2288. "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters"; in all instances, "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460-61 (1958). Regardless of the association's purpose, "[i]nfringements" on the right to associate can be "justified" only by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Jaycees*, 468 U.S. at 623. In *Jaycees*, for example, the Court gave exacting scrutiny to an associational burden on a group with the relatively mundane objective of pursuing "such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations." *Id.* at 612; *see also Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488,

2495 (2011) ("The Petition Clause undoubtedly does have force and application in the context of a personal grievance addressed to the government.").

Given that compelled subsidization of speech and mandated association receive exacting First Amendment scrutiny even in the "mundane" contexts of commercial speech and general civic groups, *Knox*, 132 S. Ct. at 2289, such compulsion clearly receives the most exacting form of scrutiny in the context of "core political" activities. *Meyer v. Grant*, 486 U.S. 414, 420 (1988). "Speech on 'matters of public concern'" is, after all, "at the heart of the First Amendment[]" and is "entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (citation omitted); *see also, e.g.*, *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (picketing on public issues "has always rested on the highest rung of the hierarchy of First Amendment values"); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 575-76 (1995).

2. Just as the government cannot compel political speech or association generally, it cannot mandate political speech or association as a condition of public employment. "Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 134 S. Ct. 2369, 2374 (2014). The Court has consistently held that governments must satisfy (and invariably cannot satisfy) exacting scrutiny when they require public employees to support political entities or ideological causes they do not wish to support.

For example, *Elrod v. Burns* held that "exacting scrutiny" applies to any "significant impairment of

First Amendment rights," which included "patronage" requirements for public employees because "[t]he financial and campaign assistance that [an employee is] induced to provide to another party ... is tantamount to coerced belief." 427 U.S. 347, 355-56, 362-63 (1976) (plurality op.). And this Court has repeatedly applied exacting scrutiny when the government compels people seeking public employment or contracts to associate with political causes they oppose, explaining that the "First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 (1990); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718-19 (1996); *see also Guarnieri*, 131 S. Ct. at 2495 ("The considerations that shape the application of the Speech Clause to public employees apply with equal force to claims by those employees under the Petition Clause."). Indeed, this Court has invalidated these requirements despite "the claim of patronage to landmark status as one of our accepted political traditions." *Rutan*, 497 U.S. at 96 (Scalia, J., dissenting).

That same exacting scrutiny applies to conditioning public employment on supporting—or not supporting—public-sector unions. Like political parties, unions and their members have "rights of assembly and discussion [that] are protected by the First Amendment." *Thomas v. Collins*, 323 U.S. 516, 534 (1945). "[T]he Constitution protects the associational rights of the members of the union

precisely as it does those of the NAACP." *Bhd. of R.R. Trainmen v. Va. State Bar*, 377 U.S. 1, 8 (1964); *see also Lyng v. UAW*, 485 U.S. 360, 366 (1988). Compelled financial support for a union is thus not cognizably different from compelled support for a political party. *See also Abood*, 431 U.S. at 242-43 (Rehnquist, J., concurring).

Indeed, unlike patronage, compelled subsidization of public-sector unions affirmatively contradicts "our Nation's traditions." *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 695 (1996) (Scalia, J., dissenting). Public-sector collective-bargaining dates only to the 1950s, Daniel DiSalvo, GOVERNMENT AGAINST ITSELF: PUBLIC UNION POWER AND ITS CONSEQUENCES at 39-40 (Oxford Univ. Press 2015), and has been controversial from the beginning, even among the labor movement's greatest champions: "[T]he process of collective-bargaining, as usually understood, cannot be transplanted into the public service." Letter from Pres. Franklin D. Roosevelt on the Resolution of Federation of Federal Employees Against Strikes in Federal Service (Aug. 16, 1937), http://goo.gl/rluHCv.

B. California's Agency-Fee Law Is Subject To Exacting Scrutiny.

California's agency-fee law forces Petitioners to subsidize Respondent Unions' political speech and is thus subject to exacting scrutiny. That is clearly the general rule in the public-union context. *Abood* itself applied this rule to a unions' ideological advocacy outside collective-bargaining, holding that the First Amendment prohibits governments from "requiring any [objecting nonmember] to contribute to the

support of an ideological cause he may oppose." 431 U.S. at 235. As *Abood* recognized, the "central purpose of the First Amendment was to protect the free discussion of governmental affairs," and this "fundamental First Amendment interest" was "no less" infringed because the nonmembers were "compelled to make, rather than prohibited from making, [the financial] contributions" that agency-shop arrangements require. *Id.* at 231, 234. But despite forbidding compelled subsidization of union lobbying or political participation. *Abood* authorized compelled subsidization of equally ideological speech in the context of public-sector "collective-bargaining."

That distinction is, to say the least, counter-intuitive. Since the First Amendment prohibits compelled subsidization of union lobbying and "other ideological causes," it would seem to necessarily prohibit compelled subsidization of "ideological causes" that are "germane to [a union's] duties as collective-bargaining representative." *Abood*, 431 U.S. at 235. Just like lobbying, public-sector bargaining's purpose is "to affect the decisions of government representatives." *Id.* at 228. The only difference between the two is that, in one context, the representatives "sit on the other side of the bargaining table." *Id.*

The dissent in *Harris* suggested that compelled subsidization of collective-bargaining speech is permissible because—unlike lobbying—the *content* of that speech is not ideological issues of public concern, but involves "prosaic stuff," like "wages, benefits, and such," that is of no "public concern." *Harris*, 134 S. Ct. at 2655 (Kagan, J., dissenting). That contention is contrary to (1) Respondent Unions' concessions

here; (2) this Court's precedent, including *Abood* itself; and (3) the undisputed topics and effects of public-sector bargaining.

1. Respondent Unions have conceded that, "in the course of collective bargaining, they sometimes take positions that may be viewed as politically controversial or may be inconsistent with the beliefs of some teachers...." JA624 (¶ 7). They admit that "public sector collective bargaining may have 'political elements'" and that core subjects of collective-bargaining—e.g., "wage policy"—"involve[] matters of public concern as to which '[a]n employee may very well have ideological objections.'" Union.BIO.21.

2. This Court's decisions likewise recognize that public-sector unions engage in political speech of public concern when they bargain with state and local officials. *Abood* itself noted "the truism" that, in collective-bargaining, "public employee unions attempt to influence governmental policymaking." 431 U.S. at 231. It recognized that collective-bargaining requires taking positions on a "wide variety" of "ideological" issues, such as the "right to strike," the contents of an employee "medical benefits plan," and the desirability of "unionism itself." *Id.* at 222. *Abood* acknowledged that collective-bargaining is intended "to affect the decisions of government representatives," who are engaged in the "political process" of making decisions on "[w]hether [to] accede to a union's demands"—decisions that turn on "political ingredients" such as the "importance of the service involved and the relation between the [union's] demands and the quality of service." *Id.* at 228-29.

This Court's other decisions confirm that collective-bargaining involves policy and political issues no different than those involved in lobbying and political advocacy. As the Court noted shortly before *Abood*, "there is virtually no subject concerning the operation of the school system that could not also be characterized as a potential subject of collective bargaining." *City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp. Relations Comm'n*, 429 U.S. 167, 176-77 (1976). More recently, the Court has recognized that a "public-sector union takes many positions during collective-bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. Indeed, "it is impossible to argue that ... state spending for employee benefits in general[] is not a matter of great public concern," given its profound effect on the public fisc. *Harris*, 134 S. Ct. at 2642-43.

Elsewhere this Court has held that threats to "blow off their front porches" during a labor dispute and protest signs declaring "God Hates Fags" constitute speech about topics that are "unquestionably a matter of public concern" or "public import." *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001); *Snyder*, 562 U.S. at 454. Surely collective-bargaining speech is not of lesser "public import" than the hateful and threatening messages that have previously received full constitutional protection.

This Court's decisions further establish that unions' collective-bargaining speech advances a distinct political viewpoint. Agency fees thus constitute viewpoint-discrimination—the most "egregious" form of speech regulation. *Rosenberger v.*

Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995). This Court's decision in *Madison*, for example, forbade barring a dissenting teacher from addressing his school board on the merits of his union's collective-bargaining proposal. 429 U.S. at 175-176. "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *Id.*; *see also, e.g.*, *Carey*, 447 U.S. at 467-68 (overturning prohibition on "nonlabor picketing" and rejecting the "desire to favor one form of speech over all others"). Agency-shop laws similarly constitute viewpoint-discrimination by compelling dissenting employees to support the union's "side" on "debatable public question[s]." *Madison*, 429 U.S. at 175-76. By contrast, political patronage is, at least, facially neutral—often working out "evenhandedly ... in the long run, after political office has changed hands several times." *Elrod*, 427 U.S. at 359 (plurality op.).

3. Even if this Court's precedent did not establish that public-sector bargaining is political speech, it "flies in the face of reality" to suggest otherwise. *Harris*, 134 S. Ct. at 2642. *First*, Respondent Unions speak to the government about the *same topics* in "bargaining" as in "lobbying." For example, numerous statutes Respondent Unions lobbied to obtain address topics that would otherwise fall within collective-bargaining, including tenure, seniority preferences in layoffs, and termination procedures. *See, e.g.*, CAL. EDUC. CODE §§ 44929.21(b); 44934; 44938(b)(1), (2); 44944; 44955. California itself recognizes as much, declining to distinguish between speech in the "collective-

bargaining" and "lobbying" contexts. *See* CAL. GOV'T CODE § 3546(b) (fair share includes "the cost of lobbying activities designed ... to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the employer"); *Knox*, 132 S. Ct. at 2304 (Breyer, J., dissenting).

Second, collective-bargaining's fiscal impact alone makes it public-concern speech. As Justice Kennedy observed at oral argument in *Harris*, a "union's position" on spending "necessarily affects the size of government ... which is a fundamental issue of political belief."[3] And that effect is profound. In 2013, the total cost of wages and benefits for state and local workers was $1.2 trillion—*half* of the $2.4 trillion in total spending by state and local governments.[4] This Court recognized as much in *Pickering*, holding that "whether a school system requires additional funds" and how it spends those funds (*e.g.*, on "athletics") are issues of "public concern." 391 U.S. at 571.

Public spending on salaries and benefits affects everything government does. As Los Angeles' former mayor has explained: "All that makes urban life rewarding and uplifting is under increasing pressure, in large part because of unaffordable public employee pension and health care costs." Richard J.

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[3] Oral Arg. Tr. 36-37, *Harris*, 134 S. Ct. 2653 (No. 11-681).

[4] U.S. Bureau of Economic Analysis, National Income and Product Accounts (http://goo.gl/wW7cD), Tables 3.3 ("State and Local Government Current Receipts and Expenditures") and 6.2D ("Compensation of Employees by Industry").

Riordan & Tim Rutten, *A Plan to Avert the Pension Crisis*, N.Y. Times, Aug. 4, 2013, http://goo.gl/ZxPFbs.

Finally, beyond wages and benefits, public-sector bargaining involves countless matters "relating to education policy." *Harris*, 134 S. Ct. at 2655 (Kagan, J., dissenting) (citing *Abood*, 431 U.S. at 263 (Powell, J., concurring in the judgment)). In California, for example, state law authorizes teachers unions to bargain over "class size," CAL. GOV'T CODE § 3543.2(a), a hotly debated policy issue. Unions also collectively bargain for seniority preferences in transferring and reassigning teachers. *Id.*; *see also, e.g.*, JA129 ("seniority ... will be the deciding factor" in filling vacant positions). Such policies have an important—and, many believe, detrimental—effect on education policy. As one expert has explained: "No student impact is as clear-cut as the negative impact of union seniority on inner-city schools." Myron Lieberman, THE EDUCATIONAL MORASS: OVERCOMING THE STALEMATE IN AMERICAN EDUCATION at 133–34 (Rowman & Littlefield Educ. 2007); *see also Vergara v. California*, No. BC 484642, slip op. at 13 (Cal. Sup. Ct. Aug. 27, 2014).

The same is true nationally. One recent study analyzed the collective-bargaining agreements in the nation's 50 largest school districts and found that unions have generally bargained for:

- teachers to be "paid on a rigid salary scale that evinces little regard for individual competence," Frederick Hess & Coby Loup, *The Leadership Limbo: Teacher Labor Agreements in America's*

Fifty Largest School Districts 14 (Thomas B. Fordham Institute 2008), http://goo.gl/GXKGsD;[5]

- "extensive labor rules" that "hobble[]" managers from efficiently assigning and terminating teachers, *id.* at 15; and
- "contracts" that "routinely stipulate the number of students a teacher will instruct, the number of preparations (i.e., courses) a teacher may have, the number of parent conferences that a teacher will hold, what time they will leave school at day's end, what duties they can be asked to perform, and even how and how often they will evaluate students' written work," *id.*

Similarly, a "recent study of teacher evaluation policies found that the teacher evaluations outlined in district contracts inhibit district administrators from truly differentiating between successful and unsuccessful teachers and from providing them with feedback to help them improve their practice."[6] Another study found that "urban schools must often staff their classrooms with little or no attention to quality or fit because of the staffing rules in their teachers union contracts."[7] In short, "collective-

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[5] At least one study has found that pay compression is responsible for the loss of high-aptitude teachers. *See* Caroline M. Hoxby & Andrew Leigh, *Pulled Away or Pushed Out? Explaining the Decline of Teacher Aptitude in the United States*, 94 Am. Econ. Rev. 236, 240 (2004).

[6] Strunk & Grissom, *Do Strong Unions Shape District Policies?*, 32 Educ. Eval. & Pol'y Analysis 389, 396 (2010).

[7] Levin, Mulhern & Schunck, *Unintended Consequences: The Case for Reforming Staffing Rules in Urban Teachers Union Contracts* 4 (New Teacher Project 2005), http://goo.gl/iAKW3D.

bargaining agreements, through negotiated rules and regulations, establish school policy and govern how teachers, administrators, parents, and students interact in the delivery of educational services."[8] And there is strong evidence that, as union-negotiated agreements become denser with rules and procedural protections, student achievement falls, especially among minority students. *See* Terry M. Moe, *Collective-Bargaining and the Performance of the Public Schools*, 53 Am. J. Pol. Sci. 156, 157 (2009).

The same is true for other professions. *See, e.g.*, Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street*, The Atlantic, Dec. 2, 2014, http://goo.gl/evqIM6 (police unions); Zach Noble, *Unions Play Watchdog—and Roadblock?—Roles in OPM Disaster*, Fed. Computer Week, June 22, 2015, http://goo.gl/rHl2aG (federal-employee unions).

4. Despite recognizing the "truism" that "public employee unions attempt to influence governmental policymaking" in collective-bargaining, 431 U.S. at 231, *Abood* nevertheless upheld compelled subsidization of collective-bargaining advocacy. It did so simply because this Court had previously upheld compelled subsidization of *private*-sector unions in *Railway Employees v. Hanson*, 351 U.S. 225 (1956), and *International Association of Machinists v. Street*, 367 U.S. 740 (1961). *Abood*, 431 U.S. at 231-32. But this Court has since recognized—without apparent disagreement by any Justice—that the "*Abood* Court seriously erred" in

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[8] Eberts, *Teachers Unions and Student Performance: Help or Hindrance?*, 17 Excellence in the Classroom 175, 177 (2007).

concluding that this Court's past authorization of compelled subsidization of private-sector collective-bargaining supported such compulsion in the "very different" public-sector context. *Harris*, 134 S. Ct. at 2632.

Approving Congress's "bare authorization" of private employers to compel subsidization of speech that lobbies *private* decision-makers about *private* issues does not support the "very different" proposition that a "state instrumentality" may "impose" subsidization of collective-bargaining speech that is "directed at the government" and designed to "influence [the government's] decisionmaking process." *Id.* at 2632-33 (citation omitted). *Street* and *Hanson* thus support neither *Abood*'s authorization of compelled subsidization of public-sector collective-bargaining nor its distinction between collective-bargaining advocacy and other political advocacy.

C. None Of The Stated Justifications For Public-Sector Agency Fees Survive First Amendment Review.

Once it is determined that public-sector bargaining involves ideological speech on matters of public concern, it becomes clear that no governmental interest suffices to support compelled subsidization of that speech. Since the proffered justifications for agency fees—the "desirability of labor peace" and avoiding "the risk of 'free riders.'" *Abood*, 431 U.S. at 224—indisputably cannot support compelled subsidization of unions' ideological advocacy in lobbying or political campaigns, they likewise cannot justify compelled subsidization of

unions' ideological advocacy in collective-bargaining. That is presumably why every current Justice seems to agree that such fees are unconstitutional if collective-bargaining involves ideological speech. *See Harris*, 134 S. Ct. at 2654 (Kagan, J., dissenting) ("[S]peech in political campaigns relates to matters of public concern ...; thus, compelled fees for those activities are forbidden.").

1. The interest in "labor peace" cannot justify mandatory agency fees.

The government's interest in "labor peace" does not justify compelling virtually every public school teacher in California to subsidize Respondent Unions' political speech. *Abood* uses "labor peace" as shorthand for the prevention of "[t]he confusion and conflict that could arise if rival teachers' unions, holding quite different views ... sought to obtain the employer's agreement." 431 U.S. at 224. But the public employer's interest in dealing with a single union justifies having only one union. It does not justify the quite different proposition that government can force all employees to support that union. As *Harris* recognized, a "union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." 134 S. Ct. at 2640.

The only conceivable link between the desire for one union and forcing employees to subsidize that union is the possibility that, absent compelled subsidization, the union will go bankrupt—thereby creating the potential for multiple bargaining groups. Governments that impose agency fees bear the burden of proving this would happen. Thus, an

"agency-fee provision cannot be sustained" unless Respondents prove that the collective-bargaining "benefits for [nonmembers] could not have been achieved if the union had been required to depend for funding on the dues paid by those ... who chose to join [the union]." *Id.* at 2641; *see also, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011) ("State's burden to justify" speech-infringing laws); *Locke v. Karass*, 555 U.S. 207, 213 (2009).

Here, as in *Harris*, "[n]o such showing has been made," 134 S. Ct. at 2641, Respondents did not allege as much below. Nor could they, since "[a] host of organizations advocate on behalf of the interests of persons falling within an occupational group, and many of these groups are quite successful even though they are dependent on voluntary contributions." *Id.* For example, unions actively represent federal employees, even though "no employee is required to join the union or to pay any union fee." *Id.* at 2640. Similarly, only "20 States have enacted statutes authorizing fair-share provisions," *id.* at 2652 (Kagan, J., dissenting), yet Respondent NEA's local affiliates ably represent public-school teachers in all fifty states. *See* NEA, State Affiliates, http://goo.gl/klzR55.

Even if eliminating agency fees diminished Respondent Unions' revenue, that shortfall would hardly imperil their existence. For one thing, Respondent Unions could simply redirect the massive amounts they and their affiliated entities spend on express political advocacy—over $211 million in such expenditures from 2000 through 2009

alone (JA92 (¶ 69); JA641 (¶ 69))—to performing their collective-bargaining duties.[9]

CTA has, indeed, made clear that, even absent agency fees, "[p]lanning, organizing, and preparedness will ensure our continued organizational strength and survival." CTA, *Not If, But When: Living in a World Without Fair Share* at 22 (July 2014), http://goo.gl/5Vs3xH. Similarly, since the beginning of 2014, the American Federation of State, County, and Municipal Employees has converted 140,000 workers into full members. Lydia DePillis, *The Supreme Court's Threat to Gut Unions Is Giving the Labor Movement New Life*, Wash. Post, July 1, 2015, http://goo.gl/oIhfLC. AFSCME'S president acknowledged that agency fees had made the union complacent; it "stopped communicating with people, because we didn't feel like we needed to." *Id.* Empirical data confirms that public-sector unions routinely thrive without agency fees. *See, e.g.*, Jason Russell, *How Right to Work Helps Unions and Economic Growth*, Manhattan Inst. (Aug. 27, 2014), http://goo.gl/HiR0jA ("According to Bureau of Labor Statistics data, from 2004 to 2013 total union membership rose by 0.5 percent in [right–to-work] states but declined by 4.6 percent in non-[right-to-work] states.").

If a majority of teachers support having a union, then it naturally "may be presumed that a high percentage" of those teachers will become "union

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[9] The same is true nationally. From 2000 to 2009, teachers unions spent more on state elections than "all business associations of all kinds"—*combined*—in 36 states. Terry M. Moe, SPECIAL INTEREST 291–92 (Brookings Institution 2011).

members" and "willingly pay[] union dues." *Harris*, 134 S. Ct. at 2641. If unions do, in fact, provide employees with valuable benefits, it is implausible that those employees would fail to voluntarily keep the union afloat.

2. The interest in preventing "free riding" cannot justify mandatory agency fees.

For two reasons referenced above, the desire to avoid "free riding" cannot justify compelled fees in this context. First, the government's only interest in preventing free-riding here is its interest in ensuring the existence of an exclusive representative. *See Knox*, 132 S. Ct. at 2290 ("Acceptance of the free-rider argument [in this context] ... represents something of an anomaly—one that we have found to be ... justified by the interest in furthering 'labor peace.'"). But again, there is no plausible allegation that exclusive representatives would perish if so-called "free riding" were permitted.

Second, "free riding" cannot justify compelled subsidization of ideological speech *inside* collective-bargaining because it does not justify compelled subsidization of ideological speech *outside* collective-bargaining. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991) (forbidding charging for "lobbying"). As established above, there is no difference between collective-bargaining advocacy and other ideological advocacy. And as noted, no current Justice believes compelled subsidization of ideological speech is permissible.

More generally, the Court's treatment of "free-riding" in other contexts establishes its invalidity

here. "[F]ree-rider arguments" are "generally insufficient to overcome First Amendment objections." *Knox*, 132 S. Ct. at 2289. Countless organizations—such as "university professors" seeking "tenure" and "medical associations" lobbying about "fees"—advocate policies that benefit other people. *Id.* But that cannot justify confiscating contributions from those "free-riders." *Id.* Hence *Harris*'s holding that "[t]he mere fact that nonunion members benefit from union speech is not enough to justify an agency fee." 134 S. Ct. at 2636. It invalidated those fees even though the union "ha[d] been an effective advocate for personal assistants in the State of Illinois." *Id.* at 2640-41.

It is thus settled law that general advocacy groups cannot compel subsidies to prevent "free-riding" and that unions cannot compel subsidies to prevent "free-riding" on non-bargaining advocacy. The dispositive question here is whether there should be an exception to this rule for collective-bargaining. There should not.

a. Foremost, it borders on the oxymoronic to conclude that teachers who *oppose* union policies are "free riding" on those policies. There are many self-interested reasons for teachers to oppose Respondent Unions' advocacy—even on core wage-and-benefit issues. Just as the mushroom grower in *United Foods* objected to generic advertisements because that grower believed treating mushrooms as fungible harmed its superior mushrooms, 533 U.S. at 411, teachers who believe they are superior have self-interested reasons to disagree with Respondent Unions' opposition to merit-based regimes.

Respondent Unions advocate numerous policies that affirmatively harm teachers who believe they are above-average. For example, the NEA's "basic contract standards" include (among other things): "[l]ayoff and recall based only on seniority as bargaining unit members, licensure/certification, and ... affirmative action"; "[s]pecified class size, teaching load, and job description"; and "[s]alary schedules ... that exclude any form of merit pay except in institutions of higher education where it has been bargained." NEA, *2015 Handbook* at 289-90, http://goo.gl/EjpDcq. NEA considers any "system of compensation based on an evaluation of an education employee's performance" to be "inappropriate," and "opposes providing additional compensation to attract and/or retain education employees in hard-to-recruit positions." *Id.* at 291. Teachers who care more about rewarding merit than about protecting mediocre teachers could (indeed, should) reasonably oppose these policies. So too for teachers who specialize in difficult subjects (like chemistry or physics), but are trapped in union-obtained pay systems that stop them from out-earning gym teachers.

And most teachers do, in fact, disagree with their unions on these issues. For example, one survey found that 53% of teachers said "the tenure system should be changed to make it far easier to remove bad teachers." *See* Steve Farkas *et al.*, *Stand by Me: What Teachers Really Think About Unions, Merit Pay and Other Professional Matters* at 20 (Public Agenda 2003), http://goo.gl/SdSQFH. Teacher opinion on merit pay was even more lopsided, with 67% of teachers supporting "paying more to those

'who consistently work harder, putting in more time and effort.'" *Id.* at 24. And 61% of teachers believed that giving assignment preference on a seniority basis "is wrong because it leaves inexperienced teachers with the hardest-to-reach students." *Id.* at 45.

b. Indeed, the "free rider" justification is far *weaker* in collective-bargaining than in any other context. Because Respondent Unions are the *exclusive* bargaining representative in Petitioners' school districts, Petitioners are prohibited from expressing their contrary views in bargaining. Exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). That power "strips minorities within the craft of all power of self-protection, for neither as groups nor as individuals can they enter into bargaining with the employers on their own behalf." *Graham v. Bhd. of Locomotive Firemen & Enginemen*, 338 U.S. 232, 238 (1949). Exclusive representation gives unions an extraordinary, state-bestowed power to speak for, and bind, all employees on the most important topics in their professional lives.

No other advocacy group can suppress contrary views in this way. Mushroom growers are free to separately advertise their "superior" mushrooms, and doctors are free to seek different Medicaid reimbursement rates than those the AMA prefers. Public employees, by contrast, cannot advance different viewpoints to their public employer in

bargaining. Exclusive representation *requires* dissenting employees to "free ride" by forbidding them from using their own vehicle to advocate their differing views.

The free-rider justification for exclusive representatives (like unions) is thus far weaker than for non-exclusive advocacy groups (like the AMA). First, nonmembers are *compelled* by the government to "free ride" on unions. The government cannot have a stronger justification for demanding "compensation" from people it requires to "free ride" than from people who do so voluntarily. Second, exclusive representation already burdens nonmembers' speech by silencing dissenters, while non-exclusive representation permits dissenters to engage in contrary advocacy. It makes no sense to uniquely authorize compelled speech in the context that *already* suppresses speech the most.

c. It has nonetheless been suggested that agency fees are more justified in the union context because unions have to nondiscriminatorily represent all employees. As the dissent in *Harris* put it: "Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost." *Harris*, 134 S. Ct. at 2656-57 (Kagan, J., dissenting) (quoting *Lehnert*, 500 U.S. at 556 (Scalia, J., dissenting in part)). But that "duty" cannot justify agency fees for at least three reasons: (1) unions voluntarily assume the nondiscrimination "duty" in order to obtain the extraordinary power of exclusive representation, a

power which must be tempered by that duty to be permissible; (2) the nondiscrimination duty is relevant only to the extent it "requires the union to go out of its way to benefit" nonmembers by altering collective-bargaining proposals, which it does not; and (3) basing *Abood*'s rule on the nondiscrimination duty would require overturning this Court's more-recent decision in *Lehnert*.

First, no law imposes a duty of fair representation on Respondent Unions; they voluntarily assumed that duty to obtain the enormous powers bestowed on exclusive representatives. The "obligation to represent all employees in a bargaining unit is optional; it occurs only when the union elects to be the exclusive bargaining agent...." *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014). Employee organizations can choose between being a "members only" union that advances only members' interests, or an exclusive representative that represents all employees. *See* CAL. GOV'T CODE § 3543.1(a) ("Employee organizations shall have the right to represent their members in their employment relations with public school employers...."); *Consol. Edison Co. of N.Y., Inc. v. NLRB*, 305 U.S. 197 (1938) (NLRA allows "members only" bargaining). Because Respondent Unions voluntarily chose to shoulder the nondiscrimination duty to enhance their power, fulfilling that duty is a voluntary act no different than "lobbying" or publishing a union "magazine." *Lehnert*, 500 U.S. at 559 (Scalia, J., dissenting in part).

Moreover, this purportedly burdensome "duty" only prohibits unions from affirmatively

discriminating against employees they have chosen to represent. And that prohibition is necessary to make constitutionally tolerable the severe restriction on dissenting employees' speech that exclusive representation causes.

This Court long ago recognized the serious constitutional questions that would arise from giving a union fiduciary *powers* over nonmembers without a corresponding fiduciary *duty* to not discriminate against them. In *Steele v. Louisville & Nashville R.R.*, an all-white union was the exclusive representative and sought to amend the collective-bargaining agreement to exclude current African-American employees from future employment. 323 U.S. 192, 195 (1944). This Court held that was impermissible. If "the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise." *Id.* at 198. Because the exclusive "representative is clothed with power not unlike that of a legislature," it is "subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates" and it "is also under an affirmative constitutional duty equally to protect those rights." *Id.* This Court thus concluded that Congress "did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority." *Id.* at 199; *see also Allis-Chalmers*, 388 U.S. at 181 ("It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found

it necessary to fashion the duty of fair representation.").

The nondiscrimination duty is thus an essential—and constitutionally mandated—"check on the arbitrary exercise" of the union's extraordinary power. *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 374 (1990). It cannot entitle unions to compensation that the Constitution withholds from every other advocacy group. The union sacrifices nothing when it refrains from discriminatorily using nonmembers as bargaining chips to inflate members' wages; it is not "go[ing] out of its way to benefit" dissenting employees. *Harris*, 134 S. Ct. at 2656-57 (Kagan, J., dissenting). Rather, the union is simply abiding by a basic equitable and constitutional principle: One cannot sacrifice the financial interests of one's constituents to artificially enhance one's selfish interests. The union in *Steele* was not entitled to special compensation from black nonmembers because it was "burdened" by the "duty" to not discriminatorily exploit them for the members' benefit.

In short, even if the validity of compelled subsidization turned on whether the subsidized group's advocacy was "voluntary" or a "duty"—which is doubtful[10]—that would not save agency fees. The "nondiscrimination duty" is simply a necessary

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[10] The government cannot create the authority to burden dissenting employees' speech by also burdening their union's speech with a nondiscrimination duty. Duty or no duty, the government is forcing dissenters to subsidize speech they reject—a rejection that has nothing to do with any (theoretical) advocacy of discrimination against nonmembers.

counterweight to the far greater speech burden unions impose on dissenting employees when they voluntarily opt to become exclusive representatives.

Second, even if the nondiscrimination duty could be characterized as a "burden"—rather than the necessary precondition to exclusive representation—it does not impose any meaningful obligation on unions. Even absent that duty, unions would not actually advocate (or obtain) discriminatory, pro-member preferences. It thus cannot be credibly "claimed" that "the union's approach to negotiations on wages or benefits would be any different if it were not required to negotiate on behalf of the nonmembers as well as members." *Harris*, 134 S. Ct. at 2637 n.18. (And Respondents have made no such allegation here.)

The nondiscrimination duty does not require unions to consider, much less advocate, nonmembers' preferences. This "duty" merely precludes unions from advocating wage-and-benefit systems that facially favor union members. [11] Forgoing such

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[11] The narrow prohibition against facial discrimination still permits unions to affirmatively disfavor nonmembers. It is "a purposefully limited" obligation, *Rawson*, 495 U.S. at 374: unions are impermissibly "arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' ... as to be irrational," *Air Line Pilots Ass'n v. O'Neil*, 499 U.S. 65, 67 (1991). Unions are free to strike deals that favor certain employees and even ones that expressly favor union leaders. *See, e.g., Washington ex rel. Graham v. Northshore Sch. Dist. No. 417*. 662 P.2d 38, 46 (Wash. 1983) (approving CBA providing "release time," during which union officers are paid for attending to union matters).

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systems costs unions nothing because unions do not advocate dual systems even when the duty does not apply. For example, when Respondent Unions advocate workplace rules in the lobbying or statewide-initiative contexts, they have no duty of fair representation. Yet they do not seek preferential conditions for union members.

Even if the unions did advocate discriminatory policies, it is extraordinarily unlikely that any government would (or could) seriously consider them. The entire point of the civil service system is to organize employees on the basis of merit rather than affiliation. *See, e.g.*, *Elrod*, 427 U.S. at 354 (plurality op.). Petitioners are aware of no public-employment system anywhere that grants preferential treatment to union members. And any such regime would, at a minimum, probably violate state (and perhaps federal) law. California's civil-service laws, for example, forbid dismissing any permanent employee

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The nondiscrimination duty does not even prevent unions from manipulating negotiations to punish nonmembers. For example, Respondent Unions have consistently declined to bargain for disability insurance as part of the employment package offered to California teachers. *See* JA90-91 (¶ 64) ("Most school districts do not provide disability insurance coverage for their employees." (quoting CTA webpage)). The unions instead offer this valuable benefit solely to their membership, *id.*, as an inducement to join the union. This is an important benefit, since such insurance is necessary to provide teachers on maternity leave with income approximating their regular salary. Otherwise, most school districts provide differential pay during maternity leave—that is, the small "amount remaining of your salary after the district pays a substitute to fill your position." *Id.* (quoting CTA webpage).

for reasons other than those on an enumerated list. CAL. EDUC. CODE § 44932(a)—a list that does not include refusal to join a union. Such union-based discrimination would also raise serious questions under state constitutions and federal law.[12]

Moreover, the nondiscrimination "duty" simply reflects the norm for advocacy groups and provides no real-world basis for distinguishing unions' collective-bargaining advocacy from all other groups' advocacy. So far as Petitioners (and. apparently. Respondents) can discern, advocacy groups do not seek differential treatment for members and nonmembers. The "Mushroom Council" in *United Foods*, for example, did not promote particular mushroom brands. "[A]lmost all of the funds collected under the mandatory assessments [were] for one purpose: generic advertising." 533 U.S. at 412.

Finally, preserving this Court's decision in *Abood* on the basis of the nondiscrimination duty would require the Court to overturn its decision in *Lehnert*. The *Lehnert* dissent argued this Court's prior

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[12] *See, e.g., State Emp. Bargaining Agent Coal. v. Rowland*, 718 F.3d 126, 133 (2d Cir. 2013) ("Conditioning public employment on union membership, no less than on political association, ... interferes with government employees' freedom to associate."); *Chico Police Officers' Ass'n v. City of Chico*. 283 Cal. Rptr. 610, 618 n.7 (Cal. Ct. App. 1991): *Lontine v. VanCleave*, 483 F.2d 966, 967–68 (10th Cir. 1973): *Hanover Twp. Fed'n of Teachers v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456, 460 (7th Cir. 1972); *Am. Fed'n of State, Cnty., & Mun. Emps. v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969): *see also, e.g.*, Fla. Const. art. I, § 6 (prohibiting discrimination based on union-membership): Okla. Const. art. XXIII, § 1A(B) (same).

decisions held that, to be chargeable, "a charge must *at least* be incurred in performance of the union's statutory duties." *Lehnert*, 500 U.S. at 558 (Scalia, J., dissenting in part). But the Court's majority emphatically "reject[ed] this reading of [its] cases"; it held instead that "our prior decisions cannot reasonably be construed to support [this] proposition." *Lehnert*, 500 U.S. at 524-25. The Court ruled that the "statutory duty" rationale "turns our constitutional doctrine on its head" and creates an "unworkable" standard. *Id.* at 526, 532 n.6. Adopting that "statutory duty" rationale would thus "preserve" *Abood* and its progeny only by overturning directly subsequent precedent deriding this interpretation of those decisions.

d. At an absolute minimum, the nondiscrimination duty cannot justify the fees Petitioners pay to the NEA and CTA. Those entities have no nondiscrimination duty at all. The only entity with a nondiscrimination duty is the *local* union chapter that signs the collective-bargaining agreement, not CTA (or NEA). *Torres v. Cal. Teachers Ass'n*, PERB Dec. No. 1386 at 4 (2000), http://goo.gl/4hFsLW. The nondiscrimination duty is thus not directly connected to the bulk of the fees Petitioners pay every year. *See, e.g.*, JA312-13 (in 2012-2013, 82% of one Petitioner's dues went to NEA and CTA).

3. Union participation in the grievance process cannot justify mandatory agency fees either.

Apparently recognizing that the nondiscrimination duty has no effect on collective-

bargaining negotiations, Respondent Unions assert that their obligation to "handle a nonmember's grievance under a collective bargaining agreement" somehow entitles them to agency fees. Union.BIO.17. But grievance representation is distinct from collective-bargaining, such that the alleged benefits of the former cannot justify compelled subsidization of the latter. Agency fees to subsidize ideological speech cannot be justified on the ground that some small percentage of those fees might aid the small percentage of employees who file CBA grievances. Speech restrictions have to be narrowly tailored to the compelling interest they serve. *See, e.g.*, *Knox*, 132 S. Ct. at 2291 ("[A]ny procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights." (citation omitted)).

But if grievance representation *is* relevant, it is clear that—just like the nondiscrimination duty—the supposed "burden" of handling nonmembers' grievances actually benefits the unions. The power to represent all employees in grievance proceedings gives unions complete control over that grievance process—further elevating the union's interests over those of dissenters. Unions are not obligated to press a nonmember's grievance if *the union* decides the grievance is not in the interest of the bargaining unit. *See, e.g.*, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974) ("[T]he interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."). And nonmembers cannot press grievances themselves once the union determines otherwise.

While the "union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion," *Vaca v. Sipes*, 386 U.S. 171, 191 (1967), employees cannot, absent such arbitrariness, "force unions to process their claims irrespective of the terms of the collective-bargaining agreement." *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 51 (1979). As California's Public Employment Relations Board has explained: "A union may exercise its discretion to determine how far to pursue a grievance on the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion." *Collins v. United Teachers of L.A.*, PERB Dec. No. 259 at 14 (1983), http://goo.gl/ONnIwW. Employees are essentially mere whistleblowers for their unions, raising the alarm about potential CBA violations that the union will pursue (or not) in its near-unfettered discretion.

Even to the extent that grievance representation does somehow burden unions, the duty to process grievances is limited to employees who make an "allegation ... that there has been a violation of ... *this Agreement*." JA178 (emphasis added). Union speech enforcing political agreements is just as political as the speech obtaining those agreements in the first place. And for teachers who *oppose* their collective-bargaining agreements (like Petitioners), assistance in enforcing those agreements has little value. Respondent Unions do not assist nonmembers on matters that would tangibly benefit them—e.g., resisting discipline or termination. Respondent Unions are not obliged to, and in fact do not, represent nonmembers in these statutory disputes. Union.BIO.2 n.1, 22-23 & n.13. *See* Comp. Ex. E at

9, ECF No. 1-5, *Bain v. CTA*, No. 2:15-cv-2465 (C.D. Cal. Dec. 5, 2013) (CTA website: "Agency fee payers are not eligible for legal services ....").

D. The New Rationale Proffered In Defense Of *Abood* Fails, Too.

Perhaps realizing that *Abood* is not justifiable on its stated basis, the dissent in *Harris* suggested that *Abood* should be reframed using the "two-step test originating in *Pickering*." *Harris*, 134 S. Ct. at 2653 (Kagan, J., dissenting). That test permits employers to restrict employee speech if the speech "does not relate to 'a matter of public concern,'" while subjecting restrictions on speech that relates to a matter of public concern to a balancing test that weighs the employee's interests in speaking against the government's interests as an employer in suppressing the speech. *Id.*

This doctrine is focused on enabling public employers to maintain the "efficient operation" of the workplace by punishing "a disruptive or otherwise unsatisfactory employee," *Connick v. Myers*, 461 U.S. 138, 151 (1983), and thus does not apply to the sort of categorical, prospective compulsion of political speech and association at issue here, *see Harris*, 134 S. Ct. at 2641 ("[N]either in [*Abood*] nor in any subsequent related case have we seen *Abood* as based on *Pickering* balancing."). Such compulsion falls within the doctrinal framework outlined *supra* at 17-21, which subjects it to exacting First Amendment scrutiny. *See also O'Hare*, 518 U.S. at 719-20 (*Elrod* applies to employer-imposed "raw test of political affiliation," whereas *Pickering* applies to

employer's regulation of "specific instances of the employee's speech").

That is particularly true here, since Petitioners' employers do not impose the agency fees at issue. Those fees are, rather, something California's legislature imposes. California law provides that the school-district "employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization." CAL. GOV'T CODE § 3546(a). *Pickering* and its progeny are thus inapplicable.

Even if *Pickering* did apply, though, it would require overturning *Abood*. This Court has already held as much: "[E]ven if the permissibility of the agency-shop provision in the collective-bargaining agreement now at issue were analyzed under *Pickering*, that provision could not be upheld." *Harris*, 134 S. Ct. at 2643. That holding was correct.

1. This Court has squarely held that bargaining over "wages and benefits" is "a matter of great public concern." *Harris*, 134 S. Ct. at 2642-43. That makes sense, since speech is on a matter of public concern if it can be "fairly considered as relating to any matter of political, social or other concern to the community." *Connick*, 461 U.S. at 146. As noted above, *Pickering* itself involved a dispute about educational expenditures—specifically "an accusation that too much money is being spent on athletics by the administrators of the school system." 391 U.S. at 571. As explained in greater detail *supra* at 21-30, public-sector collective-bargaining thus constitutes political speech about matters of tremendous public concern.

2. Given that, it should be clear that "agency fees" flunk *Pickering*. None of the Justices in *Harris* suggested agency fees are constitutionally permissible if collective-bargaining speech does, in fact, address matters of public concern. *Harris* held that the governmental interests "relating to the promotion of labor peace and the problem of free-riders" do not outweigh the "heavy burden on the First Amendment interests of objecting employees." 134 S. Ct. at 2643. The dissent did not disagree in the context of public-concern speech. *See id.* at 2654 (Kagan, J., dissenting) ("[S]peech in political campaigns relates to matters of public concern ...; thus, compelled fees for those activities are forbidden.").

That was correct. Petitioners have an obvious interest in not subsidizing Respondent Unions' political speech. Against that, the employer's only conceivable interest is in negotiating with a single exclusive representative—an interest that can only justify infringements on speech necessary to ensure there is an exclusive representative. *Id.* at 2631, 2641. And as noted, agency fees do not pass that test.[13]

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[13] Indeed, to justify agency fees on that basis, Respondents would need to show that allowing free-riding would *categorically* threaten exclusive representation, rather than merely jeopardizing a few unions. *See, e.g., United States v. NTEU*, 513 U.S. 454, 475 n.21 (1995) (the government has a much greater burden when it regulates speech categorically through "proscriptive rule[s]" than when it responds to "isolated instances of speech that had already happened"). Respondents obviously cannot make that categorical showing, given that

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Since it has only a limited interest in negotiating with a single union, the employer has no interest in preventing opportunistic "free riding" that is not causing the exclusive representative's demise (even assuming that unions have such an interest). That is probably why none of the school superintendents who employ the ten individual Petitioners has defended California's agency-fee requirement at any point in this litigation.

This Court's post-*Pickering* decisions confirm that the balance favors Petitioners. For example, in *United States v. NTEU*, 513 U.S. 454 (1995), the Court considered the constitutionality of a prohibition against federal employees accepting compensation for making speeches and writing articles. As here, the government asked the Court "to apply *Pickering* to Congress' wholesale deterrent to a broad category of expression by a massive number of potential speakers." *Id.* at 467. The Court recognized that the governmental interest in "operational efficiency is undoubtedly a vital governmental interest," *id.* at 473, but held that interest was insufficient to justify the broad prohibition on speech absent a convincing demonstration that "the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way," *id.* at 475 (citation omitted). Quoting Justice Brandeis, the Court explained: "To justify suppression of free speech there must be reasonable

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exclusive-representative unions are flourishing in states that forbid agency shops.

ground to fear that serious evil will result if free speech is practiced." *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927)).[14]

Respondent Unions have not even alleged that a "serious evil will result," *id.*, from protecting Petitioners' right to refrain from subsidizing political speech they reject. It plainly would not. If *Pickering* does apply, it likewise dooms *Abood*.

E. This Court's Traditional Bases For Departing From Stare Decisis Support Overturning *Abood*.

"*[S]tare decisis* does not matter for its own sake." *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). It matters only "because it 'promotes the evenhanded, predictable, and consistent development of legal principles." *Id.* *Abood* undermines the consistent and predictable development of legal principles that the rest of this Court's decisions firmly establish. Stare decisis considerations thus strongly support discarding that "anomaly." *Knox*, 132 S. Ct. at 2290. Indeed, because *Abood* is irreconcilable with the decisions

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[14] This Court's other decisions reinforce the heavy burden Respondents must carry to survive *Pickering* balancing. *See, e.g.*, *Lane*, 134 S. Ct. at 2374-75 (First Amendment "protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities"); *Rankin v. McPherson*, 483 U.S. 378 (1987) (on-the-job statement wishing for the President's death did not justify termination); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979) (speech on matters of public concern is protected even when expressed privately to the employer during the workday).

discussed above, the issue is not *whether* to overturn precedent; rather, it is *which* precedents the Court will uphold—*Abood*, or the many decisions it contravenes. This Court's precedent about precedent makes clear that *Abood*, rather than the remainder of the Court's First Amendment jurisprudence, is the proper precedent to overrule.

1. Stare decisis cannot trump the Constitution. This Court has thus never given stare decisis effect to a decision that erroneously deprived citizens of a fundamental constitutional right. The Court has consistently recognized that when a prior decision erases a fundamental right—such as the right to engage in truthful commercial speech—discarding that decision is necessary to preserve the constitutional right. *Compare, e.g.*, *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) ("[T]he Constitution imposes no [] restraint on government as respects purely commercial advertising."), *with Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980) ("The First Amendment ... protects commercial speech from unwarranted governmental regulation.").

The prudential values of stare decisis obviously cannot "outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Gant*, 556 U.S. at 349. If "a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any [] 'entitlement' to its persistence." *Id.*; *see also, e.g.*, *Alleyne v. United States*, 133 S. Ct. 2151, 2163 n.5 (2013) ("The force of stare decisis is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections."). That is

why "[t]his Court has not hesitated to overrule decisions offensive to the First Amendment." *Citizens United*, 558 U.S. at 363 (quoting *F.E.C. v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., dissenting)); *see also, e.g.*, *Barnette*, 319 U.S. at 642 (overturning *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

2. *Abood*'s elimination of a fundamental First Amendment freedom is alone sufficient to discard it; but even if it were not, preserving *Abood* conflicts with the basic purpose of stare decisis— "promot[ing] the evenhanded, predictable, and consistent development of legal principles." *Johnson*, 135 S. Ct. at 2563. *Abood* is at war with those values, since its rationale and result contravene basic principles this Court has consistently upheld, as outlined above. *Abood*'s departure from settled law is so obvious, in fact, that nobody defends its original rationale. Where, as here, nobody "defends the reasoning of a precedent, the principle of adhering to that precedent through stare decisis is diminished." *Citizens United*, 558 U.S. at 363.

Those who support *Abood*'s result not only fail to defend its rationale—they affirmatively reject its reasoning and that of subsequent precedent interpreting it. As established above, *Abood*'s current supporters (1) reject its standard of review and seek to replace it with the more-deferential *Pickering* balancing test; (2) reject its conclusion that collective-bargaining speech is political advocacy on public issues; and (3) reject *Lehnert*'s holding that *Abood* and its progeny do not justify agency fees based on the union's nondiscrimination duty. The purposes of stare decisis are hardly furthered when

the challenged precedent is preserved only by rejecting its standard of review *and* its rationale *and* subsequent decisions' interpretation of the preserved decision.

That is particularly true because preserving *Abood* renders this Court's general First Amendment jurisprudence not only inconsistent, but topsy-turvy. If *Abood* survives, this Court's decisions will provide greater protection against the compelled subsidization of "mundane commercial ... speech," than the compelled subsidization of core political speech. *Harris*, 134 S. Ct. at 2639. Sustaining *Abood* would further require holding that, even though Respondents' compelled political advocacy would flunk *Pickering* balancing, it somehow survives the "exacting First Amendment scrutiny" this Court gives to "agency-fee provision[s]." *Id.* at 2639, 2643. And it would also mean that the First Amendment prohibits political patronage practices embedded in our Nation's traditions, while allowing the modern invention of public-sector union patronage. *Supra* at 20-21. *Abood* thus falls squarely within the "traditional justification for overruling a prior case"—that the challenged "precedent may be a positive detriment to coherence and consistency in the law." *Patterson v. McClean Credit Union*, 491 U.S. 164, 173 (1989).

This Court's decision in *Hudgens v. NLRB*, 424 U.S. 507 (1976), underscores the point. Previously, the Court had held, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, that the First Amendment protected picketing at a private shopping center. 391 U.S. 308, 319 (1968). But four years later in *Lloyd Corp. v. Tanner*, a case involving

very similar facts, the Court went to great lengths to distinguish *Logan Valley* in holding that the First Amendment did not apply to the picketing on the private property at issue there. 407 U.S. 551, 563 (1972). The *Lloyd* Court did not overrule *Logan Valley*, but the Court later did so in *Hudgens* because "the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*." 424 U.S. at 517-18. Here, neither the reasoning nor result of *Abood* can be squared with (at the very least) *Knox* and *Harris*, and so the Court should do as it did in *Hudgens*. That is particularly true given that *Logan Valley* erroneously *expanded* First Amendment rights while *Abood* erroneously *eliminates* them.

Even more relevant is this Court's decision in *Citizens United*, overturning *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990). There, the Court overturned *Austin* because it was "confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them." 558 U.S. at 348. Faced with inevitably overturning one line of precedent or another, the Court recognized that the factors animating stare decisis weighed "in favor of rejecting *Austin*, which itself contravened this Court's earlier precedents...." *Id.* at 363. For the reasons outlined above, that same reasoning applies here.

In short, when one of this Court's decisions cannot be squared with the Court's general and subsequent precedent, this Court should discard that anomalous decision. Doing so is necessary to

preserve the integrity of the jurisprudence establishing the general rule, which is especially important where, as here, the anomalous decision fails to protect fundamental rights the Court's other decisions clearly recognize.

3. The Court's other established criteria for overturning precedent likewise support jettisoning *Abood*. This Court has long recognized that stare decisis "is at its weakest when [the Court] interpret[s] the Constitution." *Agostini*, 521 U.S. at 235 (citation omitted). Especially in constitutional cases, stare decisis must yield when a prior decision proves "unworkable," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); was not "well reasoned," *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009); creates a "critical" anomaly in this Court's decisions, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008); has failed to garner valid reliance interests, *Lawrence v. Texas*, 539 U.S. 558, 577 (2003); or has been undermined by subsequent developments, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992). *Abood* satisfies each of these criteria.

First, the line *Abood* drew between collective-bargaining and other forms of lobbying has proven to be entirely "unworkable." This Court noted as much in *Harris*, citing a long line of subsequent decisions which demonstrated that the *Abood* Court "failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." 134 S. Ct. at 2632. *Abood* "does not seem to have anticipated the magnitude of the practical

administrative problems" its line-drawing created, and the "Court has struggled repeatedly with this issue" in subsequent cases. *Id.* at 2633.

Justice Marshall's partial dissent in *Lehnert* made a similar point, showing why supposed "free-riding" on union lobbying is indistinguishable from collective-bargaining "free-riding." 500 U.S. at 537 (Marshall, J., dissenting in part). The *Lehnert* opinion "would permit lobbying for an education appropriations bill that is necessary to fund an existing collective-bargaining agreement, but it would not permit lobbying for the same level of funding in advance of the agreement, even though securing such funding often might be necessary to persuade the relevant administrators to enter into the agreement." *Id.* That distinction makes no sense, since the interest in preventing "free-riding" applies with equal force to lobbying the legislature to "increase[] funding for education" (nonchargeable) and lobbying the legislature for "ratification of a public sector labor contract" (chargeable). *Id.* at 538 (emphasis omitted). And as Justice Scalia noted in *Lehnert*, the plurality's test for drawing the *Abood* line "provides little if any guidance to parties contemplating litigation or to lower courts," and "does not eliminate [the] past confusion" because it requires subjective "judgment call[s]." *Id.* at 551 (Scalia, J., dissenting in part).

Second, as established above, *Abood* is so poorly "reasoned" that no Justice defended its rationale in *Harris*. And its authorization for compelled political speech in collective-bargaining is an "anomaly" in both reasoning and result. Stare decisis must yield when necessary to "erase [an] anomaly," *Alleyne*, 133

S. Ct. at 2167 (Breyer, J., concurring in part and in judgment), or jettison "an outlier," *id.* at 2165 (Sotomayor, J., concurring).

Third, no individual or entity has a valid reliance interest in *Abood*. "[T]he union has no constitutional right to receive any payment from" nonmembers. *Knox*, 132 S. Ct. at 2295. And the unions' desire to perpetuate their unconstitutional windfall does not create a "reliance interest that could outweigh the countervailing" First Amendment right to not pay tribute. *Gant*, 556 U.S. at 349. Nor would overturning *Abood* interfere with the "thousands of [collective-bargaining] contracts" already entered. *Harris*, 134 S. Ct. at 2652 (Kagan, J., dissenting). Overturning *Abood* would simply enable nonmembers to decline future funding for collective-bargaining efforts they reject. And as discussed, Respondent Unions have not identified anything they would have done differently absent the nondiscrimination duty, much less something that would be different *with* that duty but *without* agency fees.

Finally, factual and legal developments "have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855. On the factual front, *Abood* failed to "foresee the practical problems that would face objecting nonmembers." *Harris*, 134 S. Ct. at 2633. Employees who dispute a public-sector union's chargeability determinations "must bear a heavy burden if they wish to challenge the union's actions." *Id.* Not only that, but those chargeability decisions are bedeviled by "administrative problems" resulting from the conceptual difficulties involved in "attempting to

classify public-sector union expenditures as either 'chargeable' ... or nonchargeable." *Id.* This problem is further compounded because the auditors reviewing a union's books "do not themselves review the correctness of a union's categorization." *Id.*

Subsequent legal developments have likewise eradicated *Abood*'s core justification. That decision relied primarily on an analogy to the Court's 1956 private-sector decision in *Hanson*. But this Court decided *Hanson* in a different constitutional era when it was just beginning to recognize the now-bedrock principle that "the liberties of religion and expression may be [impermissibly] infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). *Hanson* long predates decisions like *Pickering* (1968) and *Elrod* (1976) that recognized public employees have constitutional rights against their employers.

The ink on *Elrod* was barely dry when *Abood* (1977) transposed the Court's private-sector reasoning in *Hanson* to the public sector. And in the decades since, this Court has substantially expanded the *Elrod* principle in subsequent decisions like *Rutan* (1990), and *O'Hare* (1996)—all of which conflict directly with *Abood*. *Supra* at 20-21. This Court's post-*Abood* decisions applying *Pickering* likewise provide robust protection for speech on matters of public concern and thus likewise conflict with *Abood*. *Supra* at 49-53. These wide-ranging developments have "robbed" *Abood* of its legal "justification" that the constitutional rules governing *private*-sector employees are applicable to their *public*-sector counterparts.

For all these reasons, the Court should overturn *Abood*.

II. Requiring Petitioners To "Opt-Out" Of Subsidizing Respondent Unions' Political Speech Imposes An Unconstitutional Burden On Their First Amendment Rights.

Regardless of how this Court resolves the first Question Presented, it should hold that public employees must affirmatively consent before unions can confiscate their money for nonchargeable expenditures (which would be all expenditures if this Court overrules *Abood*). Basic, venerable First Amendment principles that the Court strongly reaffirmed in *Knox* and *Harris* require states to minimize the burden they impose on teachers' established right to not subsidize nonchargeable activities.

This Court has long held that "any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights." *Knox*, 132 S. Ct. at 2291 (quoting *Hudson*, 475 U.S. at 303); *see also Harris*, 134 S. Ct. at 2639 ("[A]n agency-fee provision imposes a significant impingement on First Amendment rights, and this cannot be tolerated unless it passes exacting First Amendment scrutiny." (quotation marks omitted)). The First Amendment thus requires public-sector unions to "avoid the risk" that employees will inadvertently waive their right to withhold support for political messages. *Knox*, 132 S. Ct. at 2290. After all, "[c]ourts 'do not presume acquiescence in the loss of fundamental rights.'" *Id.* (quoting *College Savings Bank v. Fla. Prepaid*

Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999)).

As *Knox* all but held, these principles forbid Respondents' practice of requiring teachers to affirmatively object to subsidizing nonchargeable expenses. The Court explained that defaulting every public employee into subsidizing nonchargeable expenses "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id.* And as modern social science has demonstrated, "people have a strong tendency to go along with the status quo or default option." Richard H. Thaler & Cass R. Sunstein, NUDGE 8 (2008). There is no legitimate reason for imposing that "risk" or "nudge" on employees, especially since it does not even "comport with the probable preferences of most nonmembers." *Knox*, 132 S. Ct. at 2290. And even if some valid reason did exist, the First Amendment forbids requiring citizens to *rebut* "presume[d] acquiescence in the loss of fundamental rights." *Id.* Simply put, public employees' political contributions—like all political contributions—must be made voluntarily and free of coercion. The government thus cannot require its employees to affirmatively prevent it from conscripting their money in support of ideological speech. And that is true regardless of how easy it is to prevent the conscription.

Were the rule otherwise, California could direct 1% of every employee's wages to the Democratic Party so long as employees could "check a box on a form" to avoid that deduction. Union.BIO.28. But that would obviously violate the First Amendment

because failing to affirmatively "opt-out" of political contributions is materially different from voluntarily making such contributions. And capitalizing on the inertia and ignorance that distinguishes voluntarily donating from failing to opt-out is *why* Respondent Unions expend so much money and effort to preserve this "opt out" regime. *See, e.g.*, *California Proposition 32, The "Paycheck Protection" Initiative (2012)*, Ballotpedia.org, http://goo.gl/zZ4qne (CTA spent $21.1 million opposing California ballot initiative that would have ended opt-out); *California Proposition 75, Permission Required to Withhold Dues for Political Purposes (2005)*, Ballotpedia.org, http://goo.gl/0TKIvv ($12.1 million opposing similar initiative in 2005).

For these same reasons, the Constitution at a bare minimum forbids requiring Petitioners to *annually renew* their objection to subsidizing nonchargeable expenses. Regularly nudging dissenters to forfeit their First Amendment rights obviously does not "*avoid* the risk" that their funds will be used "to finance ideological activities." *Knox*, 132 S. Ct. at 2290 (emphasis added).

It is true that the Court has previously given implicit approval to opt-out regimes like California's. But as *Knox* explained, those "prior cases have given surprisingly little attention to this distinction." *Id.* Rather, "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Id.* This Court has never directly decided whether the First Amendment requires that public employees opt into subsidizing nonchargeable speech. It is therefore free to

vindicate the important First Amendment interests at stake in setting the default rule without reconsidering any prior decisions. *See, e.g.*, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (questions which are "'neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents'") (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). It should do so now.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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